SUPREME COURT, U. S.

No. 882

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IN THE

Supreme Court of the United States

OCTOBER TERM 1965

JOHN EDWARD HAWLEY,
Petitioner

vs.

COMMONWEALTH OF VIRGINIA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

FREDERICK T. STANT, JR.
1528 Maritime Tower
Norfolk, Virginia 23510

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Petitioner prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Appeals of Virginia entered in the above entitled case on October 11, 1965.

CITATIONS TO OPINIONS BELOW

The opinion of the Supreme Court of Appeals of Virginia is reported at (1965) 206 Va. 279, 144 SE 2d 314, and is printed in Appendix B hereto, infra page 2a.

JURISDICTION

The judgment of the Supreme Court of Appeals of Virginia was entered on October 11, 1965. The jurisdiction of this Court is invoked under 28 U.S.C.A. §1257 (3) [By Writ of Certiorari . . . where any title,

right, privilege, or immunity is specially set up or claimed under the Constitution . . .].

QUESTIONS PRESENTED

I. Without knowledge of the State's plan to prosecute for possession of recently stolen property, may petitioner be held to have abandoned a constitutionally protected interest in that property [The protection of that interest being afforded under the Fourth and Fourteenth Amendments to the Constitution]?

II. Whether petitioner may be denied standing to complain of an unlawful search and seizure [Prohibited by the Fourth and Fourteenth Amendments to the Constitution] upon an after the fact adjudication of abandonment of a right in the property?

STATUTES INVOLVED

Two provisions of the Constitution of the United States are applicable.

AMENDMENT FOUR: The right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT FOURTEEN: . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT

A. HOW FEDERAL QUESTION IS PRESENTED

In the Trial Court, a Motion was made to suppress certain evidence on the ground that same was illegally obtained through an unlawful search and seizure contrary to defendant's liberties as secured by the Fourteenth Amendment to the Constitution. The Motion was overruled by the Trial Court and the articles were admitted over the objection and exception of counsel for petitioner. (R. 6, 7, 8) The Motion to suppress was renewed. (R. 36, 37, 38, 39, 43) The protection of the Fourteenth Amendment was invoked. The Motion was again denied and exception was duly noted. (R. 43)

On appeal to the Supreme Court of Virginia, the rulings of the Trial Court relating to the admissability of the evidence asked to be suppressed were assigned as errors. The privileges of the Fourteenth Amendment were claimed on behalf of the petitioner. (R.5)

The Supreme Court of Appeals of Virginia specifically decided in its written opinion that the Fourth Amendment as incorporated and made applicable to

the states through the Fourteenth did not require the exclusion of the evidence complained of in the case at bar. The petitioner was held to have abandoned his interest in the property and therefore waived any right to object to an unlawful search and seizure. (Appendix B., page 2a.

Thus a Federal right was claimed at each phase of the judicial proceedings in Virginia's courts.

B. STATEMENT OF THE FACTS

A building in Great Bridge, Chesapeake, Virginia, occupied by Dr. J. D. Woodley as an office and residence, was broken and entered sometime between 8:30 A.M. and 10:30 P.M. on November 15, 1963, and a lockbox containing a quantity of coins was removed therefrom. (R. 8, 9) Entrance was effected by breaking a pane of glass in the front door of the building. (R. 14)

On the following day, November 16, 1963, the defendant, driving a 1955 Chrysler automobile, registered at a motel in Salisbury, Maryland, (R. 29, 30, 31, 32, 33) The defendant left the motel that same day. (R. 29) At the time of his departure the defendant stated to the manager of the motel, that he wished to leave the automobile at the motel and that he would return in a few days to pick it up. During that conversation the defendant also requested the manager to keep about $2,000.00 in coins in the motel safe for him, but when the manager declined to do so, arrangements were made whereby the automobile was to be parked in front of the motel office. (R. 34, 35) Because no one had called to pick up the car by November 24th, the motel operator called the Salisbury police to en-

list their assistance in locating the owner of the car. (R. 33, 34, 40, 41) The Salisbury police responded to the call, obtained the license tag number of the car and ascertained the identity of the owner through the Division of Motor Vehicles of Virginia. A police sergeant in Salisbury received a telephone call from an unidentified detective with the Chesapeake Police Department, Chesapeake, Virginia, that same afternoon to the effect that the car was believed to have been used in a burglary in that city. Upon receipt of that information the car was towed to Police Headquarters where the interior was examined and the locked trunk torn open. (R. 40, 41, 42) The search of the car disclosed seven unopened packs of proof coins in a cigar box plus part of a fifth of whiskey under the right front seat, a pair of dirty sox under the left front seat, and a black case containing coins and canvas sacks in the locked trunk. No search warrant was obtained by the Salisbury police. (R. 39, 40, 41, 42, 43)

These articles were introduced in evidence over the objection of counsel (objection being made on a claim that the petitioner was deprived of his constitutional rights under the Fourteenth Amendment to the Constitution prohibiting unlawful search and seizure). (R. 8, 9) These articles are referred to throughout the record. Without the introduction of these articles in evidence it would have been impossible to obtain a conviction against the petitioner.

On November 13, 1964, a jury in the Circuit Court of the City of Chesapeake found the defendant guilty of statutory burglary and affixed his punishment at eighteen months in the penitentiary. (R. 3, 4)

From this verdict petitioner appealed to the Supreme Court of Appeals of Virginia. (R. 4) The conviction was sustained on October 11, 1965. (Appendix B., page 2a.)

REASONS FOR GRANTING WRIT

I. The Supreme Court of Appeals of Virginia has decided a substantial Federal Question not in accord with the applicable decision of this Court in *Jones v. United States* (1960) 362 U.S. 257, 4 L. Ed. 697, 80 S.Ct. 725.

Abandonment is a concept of standing. The petitioner must have an interest in the property seized or the premises searched in order to have standing to complain of an unlawful search. Historically, one may abandon any such interest and thereby be said to lack standing to complain whether the search is lawful or not. However, this traditional analysis does not take into account the new kind of interest which is provided by *Jones v. United States* (cited supra) and its progeny. Several Circuit Court cases in the wake of the decision in *Jones v. United States* (cited Supra) have held that a prosecution when based upon the theory of unexplained possession of recently stolen goods, in itself, provides petitioner with sufficient interest to complain of any unlawful search. *Simpson v. United States,* 346 F. 2d 291 (10 Cir. 1965); *United States ex rel. Coffey v. Foy,* 344 F. 2d 625 (2 Cir. 1965) As this kind of interest arises only when the prosecution proceeds upon this theory, it would be anomalous and indeed impossible to waive or abandon such an interest until the prosecution adopts the theory. Petitioner's actions even if properly interpreted as an intentional abandonment of the car and its contents, should not be effec-

tive to deprive him of standing to challenge the unlawful search when the prosecution adopted the theory of unexplained possession of recently stolen property.

Earlier cases held that in order for a defendant to have standing to challenge the legality of a search it was necessary that he assert his right of ownership or possession in and to the property seized. However, this theory was entirely rejected in *Jones v. United States* (cited supra), where it was held that where a criminal charge against a defendant is based upon possession, the defendant is by that very fact, a person aggrieved by an unlawful search and seizure and consequently he is entitled to raise the question without claiming possession or the right to possession of the property seized.

II. What *Jones* has given petitioner the decision of the Virginia Court takes away by adjudicating an after the fact abandonment of the vehicle. If such a determination is permitted to stand, any state court may preclude a criminal defendant from the protective guarantees held applicable to state prosecution in *Mapp v. Ohio,* (1961) 367 U.S. 643, 6 L. Ed. 2d 1081, 81 S. Ct. 1684; and *Ker v. California,* (1963) 374 U.S. 23, 10 L. Ed. 726, 83 S. Ct. 1623.

Without supporting evidence the Virginia Court at Page 483 of its opinion (206 Va. 479, at 483, Appendix B, page 7a) held as follows:

> "True there is evidence in the record that Hawley did not intend to abandon any possessory right in the automobile when he left the motel on November 16th. He parked the automobile in a place where it could be observed,

obviously for the preservation of its contents. But significantly, he told the manager he would return in three or four days. Accordingly, if we recognize Hawley's intention to return when he left the motel, from what he said and did, we must recognize from the same evidence his change of intention at some time during the three or four day period. And the only hypothesis consistent with the evidence is that he determined to abandon any right in the automobile during that period, and that the abandonment occurred before the search, which was made at least eight days after Hawley's departure."

The petitioner within his absolute right to do so, remained silent at the trial. *Malloy v. Hogan,* (1964) 378 U.S. 1, 12 L. Ed. 2d 653, 84 S.Ct. 1489. Summarily the Supreme Court of Appeals has conjectured away petitioner's Fourteenth Amendment Liberties.

III. The Virginia Court seems to say that the search and seizure in this case were illegal, but the presumed abandonment forfeited any right which the petitioner may have had to complain of the deprivation. That the search and seizure were unlawful is abundantly plain from the previous decisions of this Court. *Preston v. United States,* (1964) 376 U.S. 364, 11 L. Ed. 2d 777, 84 S. Ct. 881; *Agnello v. United States* (1925) 269 U.S. 20, 46 S. Ct. 4, 70 L. Ed. 145; *United States v. Rabinowitz,* (1950) 339 U.S. 56, 70 S. Ct. 430, 94 L. Ed. 653; *Johnson v. United States,* (1948) 333 U.S. 10, 68 S. Ct. 367, 92 L. Ed. 436.

Support for the abandonment concept is attempted by decisions that are clearly distinguishable from the case at bar.

In *Abel v. United States,* (1960) 362 U.S. 217, 4 L. Ed. 2d 668, 80 S. Ct. 683, the Court held that the contents of a waste basket in a vacated hotel room were abandoned under the rationale of *Hester v. United States,* 265 U.S. 57, 58. This same evidence was held admissible as a means for the commission of espionage and were themselves seizable as such. The articles in the case at bar were never discarded as refuse, nor were they the means for the commission of a crime.

In *Feguer v. United States,* 302 F. 2d 214 (8th Cir. 1962), cert. den. 371 U.S. 872, 83 S. Ct. 123, 9 L. Ed. 2d 110 (1962), the government presented conclusive, documented proof of defendant's intention to abandon the premises in question. Defendant vacated the premises and his actions showed a clear intention never to return. The finding of the court in Feguer is based on proof, rather than rank speculation.

An unfounded hypothesis has in the instant case been employed to divest the petitioner of fundamental constitutional rights assured by the Fourteenth Amendment.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,
FREDERICK T. STANT, JR.

FREDERICK T. STANT, JR.
1528 Maritime Tower
Norfolk, Virginia 23510